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INDIGENOUS ISSUES

Written statement*/ submitted by the Aboriginal and Torres Strait Islander Commission, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[14 January 2001]

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*/ This written statement is issued, unedited, as received from the submitting non-governmental organization(s).

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The Aboriginal and Torres Strait Islander Commission ("**ATSIC**") expresses its grave concerns in relation to the processes which have developed in the Commission on Human Rights Working Group on the UN Declaration on the Rights of Indigenous Peoples ("**the Working Group**"). We note with dismay the development of adversarial approaches in the Working Group, and the increasing polarisation of indigenous and State delegations into separate and opposed blocs. This trend was more evident at the 6th session of the Working Group, held 20 November – 1 December 2000, than at any previous session.

Since the earliest sessions of the Working Group, ATSIC has sought to engage States in dialogue and has emphasised the importance of flexible, frank and consensual methods of work. We have maintained a position that the Declaration ought be capable of being adopted without amendment, alteration or deletion. However, in an effort to enhance dialogue, we have suggested some basic criteria to be met by proponents of change. We have said that the first of these criteria is the presumption as to the integrity of the existing text. To rebut that presumption, any proposed change must be shown to be reasonable, necessary and to improve and strengthen the existing text. The second criterion is the need for any proposed change to conform with the principle of equality, the principle of non-discrimination, and the absolute prohibition of racial discrimination.

Since these criteria were first proposed on behalf of ATSIC by representatives such as Gatjil Djekurra, Mick Dodson and Geoff Clark, we have seen States propose changes which have obscured and weakened the clarity of the existing text. Changes have been advanced which have neither addressed nor met these fundamental criteria. In particular, we noted with grave concern the statement by the Australian Government at the 6th session concerning the "significant changes" needed to arrive at a document which can go forward. Such statements surely justify the very real fears of indigenous participants in relation to the apparent intensions of some States to dismember completely the existing Declaration.

Consider, for example, the retrograde bracketing of the term "indigenous peoples" at the insistence of only a few States. At the 1999 session of the Working Group, in response to such bracketing the indigenous caucus proposed an "Annex on the term indigenous peoples" for inclusion in the final report. That Annex set out in detail the position of indigenous peoples' representatives in relation to the term "indigenous peoples". Many examples of international legal usage of the terms "indigenous peoples" and "Aboriginal peoples" in the practice of States. The arguments raised in the Annex have met no response from those States whose objections to "indigenous peoples" are stymieing progress in consideration of the Declaration. For indigenous participants, this is a matter of fundamental importance to the integrity of this entire process. It is a matter in relation to which we can entertain no compromise, as this would be to deny our histories, cultures and aspirations, to deny legal, political, cultural and existential realities.

In the Working Group, indigenous representatives have sought to advance our arguments in defence of the Declaration in terms of international law and theory, and consistency with standards articulated in other instruments. State delegations have largely ignored

our analysis of international norms and practice. We have been especially disappointed by the failure of States to acknowledge the work of the UN's independent human rights treaty bodies, which is very relevant to our efforts to advance support for the Declaration.

In particular, in the Working Group's continuing dialogue on self-determination, we have urged State delegations to have regard to the jurisprudence of the human rights treaty bodies. It is accepted practice in these bodies to use the language of "indigenous peoples". It is now general practice in the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, the bodies responsible for the two international human rights covenants, to inquire as to the enjoyment of indigenous peoples' right of self-determination. Similarly, at the Working Group's 5th session in 1999, the Chairman proposed that future debate on self-determination be based on three premises, including that "the universally accepted International Covenants, which contain the right to self-determination" be taken as a basis for future discussion. At the 6th session, Australia and other States opposed to language of self-determination apparently chose to ignore the Chairman's request. ATSIC considers the Chairman's proposal as appropriate and constructive. This approach provides a way forward consistent with established international human rights law and practice.

We are also troubled by States delegations' frequent references to domestic law and practice as constraining their approach to particular provisions of the Declaration. We urge States not to be limited by domestic constitutions, legislation or policy. Such an approach conflicts with the purpose of international human rights standard-setting. For example, ATSIC considers the proposed reference in article 12 to "conformity with domestic laws" to represent an unacceptable weakening of the current text. The Declaration must not be allowed to become an instrument to protect the status quo in States. Rather, it must be accepted as containing minimum international standards with which domestic laws must be brought into conformity.

ATSIC supports the call by the Saami Council and the Inuit Circumpolar Conference to consider different approaches in international practice to the concept of consensus. We suggest that the impasse might be overcome if the Chairperson were to invite those States who feel compelled to dissent from the general trend to note their reservations, but not block the consensus needed to move forward with the adoption of particular provisions of the Declaration. In particular, we urge those few States who oppose use of the term indigenous peoples to reflect upon the destabilising effect that their intransigence is having on confidence-building and progress.

We are particularly concerned that the informal State drafting sessions appear to have become institutionalised in the practice of the Working Group. As a result of their participation in such sessions, previously supportive States have shifted to accommodate the most intransigent of State participants. We have watched with dismay as discussion of articles has focussed upon the proposals produced by States in their informal consultations. We consider this to be a significant and unacceptable departure from the open dialogue and consensual working methods agreed upon at the earliest sessions of the Working Group. We note that when States' texts have been presented in plenary and

analysed by indigenous representatives, a significant number of State delegations have retreated to the position either that they could live with the original text, or that they regarded the original text as superior. This suggests that some States also are not comfortable with the trend to States' drafting sessions.

A related, disturbing aspect of the Working Group's more recent methods of work has been the manner in which States "discussion papers" have been presented to plenary. For example, at the most recent session the discussion paper on article 12 proposed a total of 25 changes to the current text. It was presented in English only. And, without any time for consultation and preparation, indigenous delegations were expected to analyse these 25 proposals, to measure them against the tests proposed, and to make interventions in response. This is not a process which ensures equal and effective participation by indigenous delegations.

During the course of the 6th session, numerous indigenous delegations inquired as to the Chairman's intentions once all States' proposed amendments have been tabled. No answer was forthcoming. Many indigenous delegations are increasingly reminded of the finalisation of the text of ILO Convention No 169, where States moved quickly to adopt a final text, with indigenous people reduced to the status of onlookers.

Finally, ATSIC reminds Members of the Commission that the Working Group is currently engaged in a first reading of the Declaration. The purpose of a first reading is to reach broad agreement on the language of provisions. At first reading, matters requiring review at a later stage are noted. The purpose of a second reading is to address matters identified at first reading for review at a later stage, and to consider any fine tuning said to be required as a result of the adoption, at first reading, of a draft text as a whole. In ATSIC's opinion, tangible progress could best be demonstrated by the Working Group's adoption, at first reading, of the Declaration's easier provisions, such as article 45. After six sessions, ATSIC is concerned that the consensual working methods previously agreed upon have broken down. We are concerned that in the absence of improved dialogue, we are further than ever from the understanding and consensus which are necessary if the Declaration is to be proclaimed by the General Assembly, and make any difference in the lives of indigenous peoples.

ATSIC does not believe that the UN can let the process of developing and adopting the Declaration on the Rights of Indigenous Peoples fail or be drawn out over many years. The gap in international human rights law in respect of indigenous rights demands resolution. The credibility of the UN human rights system and the integrity of the standard-setting processes are threatened by the present impasse. The indigenous peoples of the world deserve and need better than this.